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IN THE

Supreme Court of the United States

No. 64

October Term, 1963

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, et al.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR
DAVID THOMAS HEALY, ET AL.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	6
Statutes involved	7
Statement	8
Argument:	
I. Whether the Federal Kidnaping Act (18 U.S.C. 1201) is applicable to situations wherein there is an unlawful transportation for a lawful purpose.	9
II. Whether the statute punishing aircraft piracy (49 U.S.C. 1472 (i)), which by its terms covers "an aircraft in flight in air commerce," applies only to commercial airliners engaged in the carriage of goods and persons for hire.	12
Conclusion	15
Certificate of Service	16

CITATIONS

Cases:	Page
Bearden v. *United States*, 304 F. 2d 532 (1962), certiorari granted and judgment vacated, 372 U.S. 252 (1963)	11
Carroll v. *United States*, 354 U.S. 394 (1957)	6
Chatwin v. *United States*, 326 U.S. 455 (1945)	9
Elcheck v. *United States*, 370 U.S. 722 (1962)	11
Gooch v. *United States*, 297 U.S. 124 (1936)	9
Hayes v. *United States*, 296 F. 2d 657 (1961) certiorari denied, 369 U.S. 867 (1962)	11
Hess v. *United States*, 254 F. 2d 578 (1958)	11
Huff v. *United States*, 192 F. 2d 911 (1951)	2, 3
Langston v. *United States*, 153 F. 2d 840 (1946)	11
Sanford v. *United States*, 169 F. 2d 71 (1948)	11
United States v. *Bordon Co.*, 308 U.S. 188 (1939)	6
United States v. *McGrady*, 191 F. 2d 829 (1951)	11
United States v. *Quon*, 241 F. 2d 161 (1957)	2
United States v. *Robinson*, 361 U.S. 220 (1960)	4
Wheatly v. *United States*, 159 F. 2d 599 (1946)	11

CITATIONS (cont.)

	Page
Statutes and Rules:	
Federal Kidnaping Act, 18 U.S.C. 1201	6, 7, 9
Federal Aviation Act of 1958, Sec. 902 (49 U.S.C. 1472(i)	7, 8, 12
18 U.S.C. 3731	1, 6, 7
Federal Rules of Criminal Procedure, Rule 37(a)(2)	3
Federal Rules of Criminal Procedure, Rule 45(b)	5
Rules of the Supreme Court of the United States, Rule 11(2)	2
United States Constitution, 5th Amendment	14
Miscellaneous:	
107 Cong. Rec.:	
16544	11
16545	11
16551	13
16552	13

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OPINION BELOW

The order of the district court dismissing the indictment is not reported. (R. 7-8)

JURISDICTION

This appeal is from the judgment or order dismissing both counts of the indictment, which was entered by the District Court on September 17, 1962. The appellant's appeal from this order is only permitted by virtue of 18 U.S.C. 3731 which provides in part as follows:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . .

The appellant's Notice of Appeal from the order dismissing the indictments was not filed until December 5, 1962; 79 days after the entry of the order appealed from.

Rule 11(2) of the Supreme Court provides the time within which an appeal must be filed:

> "An appeal permitted by law from a District Court to this Court in a criminal case shall be in time when the Notice of Appeal prescribed by Rule 10 is filed with the Clerk of the District Court within thirty days after the entry of the Order or Judgment appealed from."

The appellant's Notice of Appeal from the order dismissing the indictments was not within thirty days after the entry of said order, and therefore, was untimely.

The time for appeal is jurisdictional and cannot be extended by the trial courts or the appellate courts. *United States* v. *Quon*, 241 F. 2d. 161 (1957), *Huff* v. *United States*, 192 F. 2d. 911 (1951). In *Huff* v. *United States*, supra, the court states the following:

> "Appellate jurisdiction in the Federal Court is purely statutory and there is no right to appeal save as it is granted by statute or a rule of court, which is authorized by Congress and has the force of law. The purpose of rules limiting the time for which appeals may be taken is to force an early termination of criminal cases. . . . They are designed to affix a definite, ascertainable point in time when litigation shall be at an end unless an appeal has been taken within the time prescribed. They embody considerations of certainty and stability which from the earliest times have been regarded as of first importance. . . . When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which appeal can be taken would be a dead letter."

Research fails to reveal a single criminal case or statute authorizing the appellant to file a motion for rehearing in the instant case, much less any law holding that such a motion extends the time for appeal. To allow the United States to stop the running of the time for appeal by filing a petition of this nature, would give the government the power to extend the time for appeal, in such cases, indefinitely.

Appellant cites only civil cases, clearly not applicable in the instant criminal case, in its response to the Motion to Dismiss Appeal, for the proposition that the time for appeal commences to run from the date of the denial of the rehearing. In addition, appellant relies on Rule 37(a)(2) Federal Rules of Criminal Procedure, which provides:

> "Time for taking appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, with a motion for a new trial or an arrest of judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . . An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

This rule specifically allows the defendant to stay the running of time for appeal by Motion for New Trial or Motion in Arrest of Judgment. However, conspicuously omitted from the right of government to appeal within thirty days from "the entry of the Judgment or Order appealed from" is any corrolary right of the government to extend the time for appeal. Clearly, if the government was to have the right to file motions extending the time for appeal, this rule would have expressly so provided.

In *United States* v. *Robinson*, 361 U.S. 220 (1960), this Court stated at 222,

> "The single question presented is whether the filing of a notice of appeal in a criminal case after expiration of the time prescribed in Rule 37 (a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of the excusible neglect."

This Court discussing this issue stated at 229:

> "Rule 45(b) says in plain words that the '. . . Court may not enlarge . . . the period for taking an appeal.' The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional. The history of Rule 45(b) shows that consideration was given to the matter of vesting a limited discretion in the courts to grant an extention of time for the taking of an appeal, but, upon further consideration, the idea was deliberately abandoned."

This Court, after fully examining the language of the Rules of Criminal Procedure 45(b), its legislative history and the decisions interpreting it, reversed the appellate court and stated at 229:

> "It follows that the plain words, the judicial interpretations, and the history of Rule 45(b) not only fail to support, but actually oppose, the conclusion of the Court of Appeals, and therefore its judgment cannot stand."

In *United States* v. *Quon*, supra, the court held that the denial of a Motion for Reargument by the defendant, does not extend the time for appealing from the original order. Therefore, even if the government has a right to file a Motion for Rehearing or Reargument, the time for appeal from the original order is not extended. If this appeal is not from the order dismissing the indictment, but from the order denying the petition for rehearing, this court lacks jurisdiction as this appeal would be outside the scope of

Title 18 Section 3731 of the United States Code, as the statute limits direct appeals from this court to orders dismissing the indictment.

Statutes permitting criminal appeals on the part of the United States have always been strictly construed because government appeals in such cases are uncommon, exceptional and unfavored. *Carroll* v. *United States*, 354 U.S. 394, (1957); *United States* v. *Bordon Co.*, 308 U.S. 188, (1939). This Court in the *Carroll* case, supra, stated at 399:

> "The history shows resistance of the court to the opening of an appellate rule for the government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by statute."

It is respectfully submitted that the government's appeal from the order dismissing the indictments is untimely, or in the alternative, if the government's appeal is from the order denying the petition for rehearing, it is clearly outside the scope of appeals permitted by the United States in Title 18 Section 3731 of the United States Code and therefore, this court should dismiss the appeal for lack of jurisdiction.

QUESTIONS PRESENTED

1. Whether the Federal Kidnaping Act (18 U.S.C. 1201) is applicable to situations wherein there is an unlawful transportation for a lawful purpose.

2. Whether the statute punishing aircraft piracy (49 U.S.C. 1472(i)), which by its terms covers "an aircraft in flight in air commerce," applies only to commercial airliners engaged in the carriage of goods and persons for hire.

STATUTES INVOLVED

18 U.S.C. 3731 provides in part as follows:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decisions or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

18 U.S.C. 1201 provides in part as follows:

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Public Law 87-197, enacted on September 5, 1961,

75 Stat. 466, amended Section 902 of the *Federal Aviation Act* of 1958 (49 U.S.C. 1472) in part by adding:

AIRCRAFT PIRACY

(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished —

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

STATEMENT

The appellees accept the appellant's statement as being substantially correct.

ARGUMENT

I

Whether the *Federal Kidnaping Act* (18 U.S.C. 1201) is applicable to situations wherein there is an unlawful transportation for a lawful purpose.

It is well established under *Gooch* v. *United States*, 297 U.S. 124 (1936) and the cases that follow it, that the addition of the words "or otherwise" to the amended *Federal Kidnaping Act*, 18 U.S.C. Section 1201, are not limited to acts which result in pecuniary benefit to the kidnaper. However, there have been cases where this court and other Federal Courts have spoken up against the proposition that the *Federal Kidnaping Act* was to be used for a wide variety of unattractive situations.

In *Chatwin* v. *United States*, 326 U.S. 455 (1945) a case involving celestial marriage of a Mormon and a fifteen year old girl without her parent's consent, this Court said at 464:

> "But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking the very essence of the crime of kidnaping. . . . No unusual or notorious situation relating to the inability of state authorities to capture and punish participants in such activities evidenced itself at the time this Act was created; no authoritative spokesman indicated that the Act was to be used to assist the states in these matters,

however unlawful and obnoxious the character of these activities might otherwise be. Nor is there any indication that Congress desired or contemplated that the punishment of death or long imprisonment, as authorized by the Act, might be applied to those guilty of immoralities lacking the characteristics of true kidnapers. In short, the purpose of the Act was to outlaw interstate kidnapings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that plain fact in mind.

Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act, the boundaries of potential liability would be lost in infinity. *A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act for the benefit of the former, state lines subsequently being transversed. The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction.*" (Emphasis added.)

In the *Gooch* case, supra, and the cases following *Gooch*, the conviction under the *Federal Kidnaping Act*, supra, involved an unlawful transportation for the accomplishment of an *unlawful purpose*. However, in the case at bar the indictment alleges an unlawful transportation for a *lawful purpose* — to wit: transportation from Florida to Cuba.

The cases cited by appellee in pages 8-12 of its brief involve an unlawful transportation for an unlawful purpose. The purpose of the transportation in *Gooch* v. *United States*, supra, was to prevent police officers from arresting their captors. In *United States* v. *McGrady*, 191 F. 2d 829 (1951), the purpose of the transportation was to aid an escape from prison. In *Hayes* v. *United States*, 296 F. 2d 657 (1961), certiorari denied 369 U.S. 867 (1962), it was for the purpose of fleeing from the police, as was the case in *Hess* v. *United States*, 254 F. 2d 578 (1958). In *Sanford* v. *United States*, 169 F. 2d 71 (1948), the transportation was for the unlawful purpose of robbing the victim; *Langston* v. *United States*, 153 F. 2d 840 (1946), purpose was for robbing the victim and preventing him from reporting an automobile theft. Although in *Wheatley* v. *United States*, 159 F. 2d 599 (1946), and *Bearden* v. *United States*, 304 F. 2d 532 (1962), certiorari granted, and judgment vacated on another ground, 372 U.S. 252 (1963), remanded in the light of *Elchek* v. *United States*, 370 U.S. 722 (1962), involved kidnaping for purposes which are not specifically illegal; both of the cases have been reversed and so only serve as dictum and not as law required to be followed.

The appellee's contend that this Court should recognize the difference and not extend the scope of the *Federal Kidnaping Act* to cover an unlawful transportation for a lawful purpose. It is respectfully submitted that the Act and severe penalties required thereunder, should not be applied to the indictment in the instant case.

II

Whether the statute punishing aircraft piracy (49 U.S.C. 1472(i)), which by its terms covers "an aircraft in flight in air commerce," applies only to commercial airliners engaged in the carriage of goods and persons for hire.

In an effort to determine whether "an aircraft" as used in Section 902 of the *Federal Aviation Act of 1958*, 49 U.S.C. 1472(i), as amended in 1961, was intended to apply to private, as well as commercial airlines, the appellees will cite parts of the *Congressional Record* dealing with this issue. That Congress was vitally interested in protecting individuals aboard commercial airliners is evident from the August 21st speech of Congressman Harris in which he says at 107 *Congressional Record* 16544, that the impact of piracy and "its seriousness is magnified manifold when committed on a speeding jet airliner." At 107 *Congressional Record* 16544 and 16545, Harris refers to five separate airline incidents that occurred exemplifying the need for some sort of air piracy legislation:

1. National Airlines plane forced to fly to Cuba (May 1);

2. Eastern Airlines jet plane forced to fly to Cuba (July 25);

3. Attempted hijacking of a Continental Airlines jet (August 3);

4. Pan American Jet forced to fly to Cuba (August 9);

5. Knife assault on an airline captain aboard a non-stop flight from Chicago to Los Angeles (July 8).

It should be noted by the Court that the above incidents which prompted Federal legislation involved only commercial airlines.

The need for additional legislation to protect commercial airlines was pointed to by Congressman Rostenkowski at 107 *Congressional Record* 16552 when he said:

> "Recent events that have occurred during scheduled commercial airline flights indicate that a vacuum exists in present statutes. . . . "

Congressmen Ryan, Edmondson, Libonati, and Curtin emphasized their concern for protecting passengers on commercial airliners at 107 *Congressional Record* 16551. Congressman Ryan refers to the hijacking of "a commercial flight." Congressman Edmondson says that he favors laws in this area and has "introduced a similar bill in the belief that such a law will operate to discourage the piracy of *American airliners*. . . . " Congressman Libonati makes it quite clear that he is concerned with "the welfare and safety of the crew and passengers who may number as many as 100 people in today's modern planes."

The government's brief (p. 14) contends that Section 902(i) "on its face . . . applies without reservation to *any* aircraft" (emphasis theirs), however, this does not aircraft" as the government would have the Court believe. in flight in air commerce" (emphasis ours) and not "*any* aircraft" as the government would have the Court beliefe. If legislative intent was to cover "*any* aircraft" why were

not the words "*any* aircraft in flight in air commerce" used? It is clear that "on its face" the statute does not apply to both private and commercial airlines. If "on its face" the technical words of art "aircraft in flight in air commerce" applied to anything, it would appear they should apply only to commercial airliners that deal in services to the general public in the "commerce" sense.. Further in its brief, (p. 14) the government says, "Moreover, it is evident that when Congress wished to frame a provision applicable only to air carriers, it knew how to do so." The appellees agree, and contend that Congress would have framed the statute so it would be *expressly* applicable to both private and commercial airliners, if it had wished to do so.

It is clear that the lower court felt that the *language* of the statute was limited to commercial airliners and was not intended to cover acts of piracy on private aircrafts. The 5th amendment of the *United States Constitution* guarantees to criminal defendants that they be informed of the exact nature of the offense they are charged with in order that they may prepare a proper and adequate defense. It is the appellees contention, that if this court finds the statute in question was intended to cover private as well as commercial airliners, that the statutory language is vague and ambiguous and violates the *United States Constitution.*

CONCLUSION

For the reasons stated, appellees respectfully submit that this Court should affirm the judgment below, or in the alternative, dismiss this cause for lack of jurisdiction.

Respectfully submitted,

R. E. KUNKEL
ROBERT L. SHEVIN
ALVIN GOODMAN
SYLVAN N. HOLTZMAN
HARRY M. ROSEN

August 22, 1963

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellees' Brief has, pursuant to Rule 33(1) of the Revised Rules of the Supreme Court of the United States, been served by mail upon ARCHIBALD COX, Solicitor General, Department of Justice, Washington 25, D. C., by air mail, and hand delivered upon WM. A. MEADOWS, JR., United States Attorney of the Southern District of Florida, Federal Building, Miami, Florida, this 22 day of August, 1963.

R. E. KUNKEL